negligence of his engineer occupying the position of "*ad interim* conductor." The perplexity caused by these inharmonious decisions is well illustrated in the earlier stages of the present case. The trial court instructed the jury that under the rule of the Supreme Court the conductor of a freight train is a vice-principal. On appeal the judges of the Circuit Court of Appeals for the First Circuit were unable to decide the point and referred it to the Supreme Court. This court has done well in now definitively overruling the Ross case and affirming that it cannot under the ordinary conditions of railroading "hold a conductor of a freight train to be a vice-principal within any safe definition of that relation."

Justice Harlan, who concurred in the decision of the Ross case, dissents on the ground that the control of a conductor over a train is sufficient to render him a vice-principal. This view, if logically applied, would make almost any boss over a particular piece of work in a department stand in that position. The conductor of a train is under instructions from train operators and other officials and is in no wise superintendent of a department. That the master is liable for the gross negligence of a servant of superior rank is held in Ohio, Kentucky, and perhaps a few other states. But the weight of authority is strongly the other way. On principle, it would seem that the reason for the qualification to the rule of nonliability of the master for negligence of fellow servants, which is made in the case of a vice-principal, extends only to such superintendents as for all purpose relating to the control of the department and servants in it, stand in the shoes of the principal. A servant, of no matter how high grade, himself under the control of other servants, does not hold that position.

The case is a valuable one for its review of the authorities on the whole subject of the liability of master to servant.

CIVIL SERVICE OF CITIES—APPOINTMENTS FROM ELIGIBLE LISTS.

Since the inauguration of the civil service legislation, the question as to eligibility to appointment to public offices has often found its way into the courts. In this connection the recent case of *People et rel. Balcom v. Mosher et al.*, 61 N. Y. Supp. 452, is of some interest, in that the court interprets the provisions of the Constitution of the State of New York, relative to this question, and declares that the statute and civil service rules, passed in pursuance thereof, providing for the appointment of the person graded highest on the proper eligible list, is in conflict with the Constitution of the state.

The Constitution, Art. 5, Sec. 9, in substance provides That the appointments in the civil service of the state shall be according to

merit and fitness, ascertained so far as practicable by competitive examination. The statute and rules above cited can readily be harmonized with this section. But the Constitution, Art. 10, Sec. 2, makes a further provision that "all city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such city * * * *or appointed by such authorities thereof, as the legislature shall designate for that purpose.*" This provision clearly contemplates some degree of discretion as to the personnel of the appointee. The statute and rules are therefore in conflict with this provision.

It will be found upon an examination that, prior to the adoption of the Amendments to the Constitution, which are now under consideration, the practical construction of the then existing civil service laws, requiring appointments to be made as the result of competitive examinations, was not to compel the appointment of the person standing highest upon the list, as a result of such examination, but permitted the selection of one out of a limited number of those standing highest upon the list. The object of these civil service rules was to reduce the opportunities for favoritism to the lowest point deemed possible, yet to leave some degree of discretion and responsibility for the appointment in the officer making it.

In endeavoring to ascertain the intention of the law-makers upon any given subject, the history of the times, and of the subject, and of the laws and customs in relation to it, if any existed, the proceedings of the law-makers, and the evils intended to be corrected, and the good to be accomplished, must be considered. It is a familiar rule of construction, that the framers of constitutions and statutes are presumed to have a knowledge of existing laws, and that the instruments that they frame and adopt, are framed and adopted in reference to such existing laws.

After a lengthy review of the authorities and also a short historical discussion of civil service legislation, the court comes to the conclusion that there can be no doubt that in adopting the Amendments of the Constitution, the framers intended to continue the hitherto uniform rule as to "at least a limited and restricted discretionary power," and not to compel the appointment of the one highest upon the eligible list, and thereby also deprive the appointing authority of the very essence of the power elsewhere granted.

The decision in thus reconciling these provisions of the Constitution, clearly elucidates the rigidness with which that fundamental rule of construction, namely, that in interpreting the Constitution, it is to be considered as a whole, complete in itself, and force and effect must be given to every provision contained in it, is applied.